Supreme Court, U.S.
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No. 971656 APR 8 1998

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In The

Supreme Court of the United States

October Term, 1997

LINDA SLOAN,

Petitioner,

vs.

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas and STATE OF TEXAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the employee in a Title VII hostile work environment case entitled to a jury instruction that the employer is liable for the sexual harassment acts of its supervisor if the supervisor was entrusted with the position of responsibility for supervising the employee?

2. Is the employee in a Title VII *quid pro quo* sexual harassment case entitled to a jury instruction that the employer is absolutely responsible for the sexual harassment of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluation or termination?

3. When the trial judge refused to give the requested jury instruction as referred to in paragraph No. 1 above and the employee made timely objection under Fed. R. Civ. P. 51, did the trial court and the Circuit Court commit reversible error in denying the employee the requested jury instruction?

4. When the trial judge refused to give requested jury instruction as referred to in paragraph No. 2 above and the employee made timely objection under Fed. R. Civ. P. 51, did the trial court and the Circuit Court commit reversible error in denying the employee the requested jury instruction?

PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the caption of the case in this Court, one other party not a part of the petition for writ of certiorari is Grundy Wiley.

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IN THE
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Linda Sloan ("Sloan") respectfully requests that a writ of certiorari be issued in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is found in Appendix A. The unpublished opinion of the district court of the Southern District of Texas, Houston Division, is found in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered January 8, 1998. The Court of Appeals granted Sloan's motion to file a petition for rehearing out of time on February 12, 1998. (Appendix C.) The Court of Appeals denied Sloan's petition for rehearing on February 12, 1998. (Appendix C.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 51 of Title 28 provides in its relevant parts:

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

42 U.S.C. § 2000e(b) provides in its relevant parts:

§ 2000e. Definitions

For the purposes of this subchapter—

. . . . .

(b) The term "employer" means a person engaged in an industry affecting commerce who

has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

STATEMENT OF THE CASE

The fundamental question in this case is whether the employer is liable for the sexual harassment acts of its highest ranking on site management employee, Grundy Wiley ("Wiley"). Wiley, the manager at the Houston–Southwest office where Sloan worked, had a duty under management rules to report sexual harassment to upper management. The record is replete with testimony claiming Wiley, who is male, sexually harassed Sloan and other female employees. Wiley never reported such sexual harassment.

Sloan testified of the repeated sexual harassment of her by her supervisor, Wiley. According to Sloan's testimony, while in the field with Wiley, he placed his hands in a sexual manner on Sloan's upper leg. Tr. 176. Sloan testified that Wiley called Sloan late at night at her home and on one occasion came to her house uninvited. Tr. 164-165. Sloan's testified that she reported to Wiley that co-workers were speculating whether Sloan could reach a sexual climax, that Sloan was inappropriately sexually touches by co-worker Ed Herron, and that co-worker Jodie Moore asked Sloan when Sloan gave him change why she put "pubic hairs" in the change. Tr. 91, 238-239, 241, 244. The record is clear that except for giving Jodie Moore an oral reprimand, Wiley neither reported sexual harassment to upper management nor did he discipline any employee under him.

Sloan's testimony was buttressed by her co-worker's testimony, especially the testimony of Joyce Coleman ("Coleman") and Dyveonna Craddock Carolina ("Carolina"). Coleman testified that Wiley called Sloan into Wiley's office more than other employees. Tr. 106. Further, Coleman testified that Wiley made extensive visits to Sloan's desk. Tr. 105-106. Shepherd testified that Wiley would walk into Sloan's office with no shoes. Tr. 81. Like Coleman, Carolina also testified that Wiley would sit on Sloan's desk with no shoes. Tr. 51. Sloan testified that on one occasion Wiley, who was wearing no shoes, called Sloan into Wiley's office, closed the door, pulled his chair close to Sloan's chair and placed his feet on top of Sloan's feet in a sexual manner. Tr. 171-172. On this occasion

before Wiley could go further, he was interrupted by a knock on the closed door. *Id.* On another occasion, Wiley came into Sloan's office wearing no shoes. Tr. 173. Wiley pulled a chair up next to Sloan. *Id.* Soon Sloan felt Wiley's stocking feet on the top of Sloan's feet. *Id.* Sloan advised Wiley Sloan did not like what he was doing. *Id.* Sloan testified that several times Wiley would come by Sloan's desk, lean on the desk and put Wiley's shoeless feet on top of Sloan's feet. Tr. 164, 170. Sloan testified that while at her desk, Wiley would ask her personal questions and ask her what kind of perfume she was wearing. Tr. 162-173. Sloan and her co-workers testified that Wiley continuously bothered Sloan at Sloan's desk. Carolina testified that frequently Wiley would sit on top of Sloan's desk real close to Sloan, and according to Carolina, Sloan would begin crying. Tr. 52.

Carolina, Sloan's fellow employee, testified that Carolina suffered sexual harassment at the hand of Wiley. Carolina testified that at one time, Wiley approached Carolina's desk with his pants unzipped and no shoes. Tr. 47. Carolina testified that she was shocked, but Wiley eventually left her desk. Tr. 48. On another occasion, Wiley called Carolina into his office. *Id.* Carolina testified that this time: "he got close to me and said, 'I just wanted you to know I can see your breast.'" Tr. 48. Carolina testified when Wiley discussed her breasts, Carolina was wearing a shirt buttoned up and a jacket suit. *Id.* Further, Carolina testified that "there's no way he could see my breast unless he had x-ray vision." Tr. 49.

The trial record is replete with testimony supporting Sloan's claim of a sexually hostile work environment. On Wiley's birthday, an erotic dancer or stripper performed at the birthday party. Fern Francis ("Francis"), Sloan's supervisor at the time, summoned Sloan and other employees to the office used as a party room. Tr. 50-51, 168, 542. Sloan testified the stripper was down to her G-string with the top of her breast covered when Francis finally turned the music off. Tr. 169-170. In contrast to Sloan, Eicke, one of the supervisors, testified that once the stripper began to take off her clothes, the performance was stopped. Tr. 140. No one disputes the presence of a stripper in the work place.

PROCEEDINGS BELOW

As required under Fed. R. Civ. P. 51, Sloan made a timely objection to the jury charge prior to the jury retiring to consider its verdict. Tr. 564-565. As to Sloan's claim under the theory of *quid pro quo*, Sloan requested the following instruction:

> The Court instructs you that respondeat superior in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination. (App. D.)

As to Sloan's claim under the theory of sexually hostile work environment, Sloan requested the following instruction:

> Sexually discriminatory verbal intimidation, ridicule and insult may be insufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.
>
> Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the supervisor was entrusted with the position of responsibility of supervising the employee. (App. D.)

The trial court denied both of Sloan's requested jury instructions. Tr. 564-565. When the jury found against Sloan, she appealed timely. (App. B.) Docket Entry 173, filed 2/14/97. The Circuit Court denied Sloan's appeal, therein affirming the district court. Thereafter, Sloan filed timely this petition for writ of certiorari.

IN DENYING SLOAN'S REQUESTED JURY INSTRUCTIONS, THE TRIAL COURT FAILED TO INSTRUCT JURORS FULLY, CLEARLY AND CORRECTLY ON APPLICABLE LAW

The trial court must instruct jurors fully, clearly and correctly on applicable law. *Bender v. Brumley*, 994 F.2d 1151, 1157 (5th Cir. 1993); *Horton v. Buhrke, A Division of Klein Tools, Inc.*, 926 F.2d 456, 460 (5th Cir. 1991). All circuits who have addressed the question of whether Title VII allows an employee to bring claims against supervisors in their individual capacities have held such claims are not actionable. See, for example, *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 n.2 (5th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.) *cert. denied* 513 U.S. 1015 (1994).

The trial court denied Sloan's timely requested instruction asking the trial court to instruct the jury that the employer[1] was liable for Wiley's sexual harassment and Wiley's failure to report sexual harassment to the employer. Sloan contends that because Wiley was under an obligation to report sexual harassment to upper management, once Wiley had knowledge of sexual harassment, even if Wiley

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[1]The defendant in trial court, appellee in circuit court, and respondent in this court is identified in the record as State of Texas, Comptroller of Public Accounts for the State of Texas, and John Sharp in his official capacity as Comptroller, State of Texas, and collectively referred to as "the Comptroller." The respondent is referred to in this petition as the "employer."

was the harasser, Wiley's knowledge was imputed to the employer. To find otherwise would immunize an employer from liability while denying the employee a remedy for unlawful and impermissible activity.

Absent a jury instruction as to vicarious liability, the jury did not understand or may to have understood that if it believed the testimony of Sloan and other witnesses with regard to Wiley's sexual harassment and Wiley's failure to report sexual harassment to upper management, the employer was liable for sexual harassment under Title VII unless the employer took prompt remedial action. *Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied* 107 S.Ct. 952 (1986). In other words, for purposes of liability Wiley was the employer.

DISCUSSION OF APPLICABLE LAW: FIFTH CIRCUIT

In affirming the trial court, it appears that the Circuit Court in the unpublished opinion violated its own rules by overturning a published opinion by another panel. *Lowrey v. Texas A&M System*, 117 F.3d 242. 247 (5th Cir. 1997).

The Fifth Circuit has held that Congress: "impose[d] vicarious liability on an employer for its employee's unlawful discrimination when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* Thus, a municipality may be found liable based on *respondeat superior* under Title VII." *Jett v. Dallas Indept. School District*, 798 F.2d 748, 762 n.13 (5th Cir. 1986),

citing *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986). In *Jett*, an employment discrimination case under 42 U.S.C. §§ 1981 and 1983 denying liability against the defendant school board based on Eleventh Amendment immunity, the court noted that Title VII overrides Eleventh Amendment immunity. *Hamilton* was an employee discrimination case involving a racially hostile work environment. The employee's first line supervisors participated in and acquiesced in the racial discrimination. This circuit found vicarious liability on the part of the employer "for the discriminatory acts of its supervisory personnel." *Hamilton, supra.*, 444. This circuit noted with regard to the supervisors: "[H]aving entrusted positions of responsibility to ... [the supervisors], the ... [employer] may properly be held accountable for the abuse of their authority." *Id.*

Again in *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), the Fifth Circuit reaffirmed the principle that: "[A]gency principles apply to section 1981 (and to Title VII) to hold an employer liable for those intentional wrongs of his employees that are committed in furtherance of the employer...." *Id.* [*Patterson* was an employee discrimination hostile environment case where racial slurs were used by the supervisor and because of the supervisor, employees were actually terminated or constructively terminated.]

DISCUSSION OF THE LAW: OTHER COURTS

The Tenth Circuit in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *pet. for cert.* filed 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997), establishes four bases for vicarious liability under Title VII, to-wit: (1) the supervisor committed harassment while acting in the scope of employment; (2) the employer knew or should have known about the harassment and failed to respond in a reasonable manner; (3) the employer manifested in the supervisor the authority to act on its behalf resulting in harm to the employee, and the employee relied on the apparent authority; and (4) the employee delegated authority to the supervisor to control the employee's work environment, and the supervisor abused such delegated authority in perpetrating sexual harassment. at 1446. In *Harrison* the Tenth Circuit found that failure to give an instruction on employer liability was error prejudicing the employee, and insofar as the Court instructed the jury as to agency, the instruction was erroneous.

Faragher v. City of Boca Raton, Ill., F.3d 1530 (11th Cir. 1997) (en banc), *cert.* at _U.S. _, 139 L.Ed.2d 337, 118 S.Ct. 438 (1997), involves the issue of vicarious liability. In *Faragher* the Eleventh Circuit held that the City was not liable for the harassment of female lifeguards by their supervisor because the lifeguards' only internal complaint was to another supervisor who did not outrank the harassers and who was considered a friend, and because the plaintiffs worked at an isolated location.

In *Kimbro v. Arlantic Richfield Co.*, 889 F.2d 869, 876-877 (9th Cir. 1989), *cert. denied* 498 U.S. 814 (1960), a case

under the Americans with Disabilities Act ("ADA"), the Ninth Circuit held that the employer was bound by the knowledge of the employee's immediate supervisor that plaintiff's frequent absences from work were due to his cluster migraine condition although the supervisor failed in his duty to report the plaintiff's condition, thus rendering the defendant liable for any failure to make a reasonable accommodation under Washington's disability discrimination law.

In *Karibian v. Columbia University*, 14 F.3d 773, 780 (2nd Cir. 1994), the Second Circuit held that in all *quid pro quo* and many hostile work environment cases of sexual harassment, the employer is liable under the theory of agency. at 780. The Second Circuit held: "an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *Id.* In *Karibian* the hostile work environment claim alleged that the supervisor "capitalized upon his authority over her employment to force her to endure a prolonged, violent and demeaning sexual relationship." *Id.* In reversing the district court's summary judgment, the Second Circuit held that the facts as alleged in *Karibian*, if true, made the employer liable under agency law. *Id.*

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO REMEDY A SPLIT IN THE CIRCUITS CREATED BY THE OPINION BELOW.

In one form or another, the Second, Ninth and Tenth Circuits upheld the employee's claim of vicarious liability against the employer in Title VII or ADA cases based on violations of the Acts by the supervisor or violations of the Acts not reported by the supervisor. *Karibian, supra.; Kimbro, supra.; Harrison, supra.* In published opinions prior to its January 8, 1998, opinion, the Fifth Circuit has held that the employer is vicariously liable for Title VII violations by the employee's immediate supervisor. *Jett, supra.; Hamilton, supra.*

In addition to the Fifth Circuit in the instant case, the Eleventh Circuit in *Faragher, supra.* has held that vicarious liability does not attach for sexual harassment by an immediate supervisor. *Faragher, supra.*

Sloan respectfully urges this Court to reconcile the differing Circuit opinions.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE INTENT OF CONGRESS.

Title VII at 42 U.S.C. § 2000e-(b) defines the term "employer" as including any "agent" of an employer. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), this Court held that employers are not automatically liable for sexual harassment by their supervisors, that "absence of notice to an employer does not necessarily insulate that employer from liability," and that "Congress wanted courts to look to agency principles for guidance in this area." At the same time, the Court cautioned that "such common-law principles may not be transferable in all their particulars to Title VII."

Sloan respectfully urges this Court to clarify Congress's intent and the law as to the application of the law of agency *vis-a-vis* Title VII.

III.

THIS COURT SHOULD GRANT CERTIORARI DURING THE PENDENCY OF FARAGHER IN THE INTEREST OF MANIFEST JUSTICE.

On August 6, 1997, petition for certiorari was filed in *Harrison*. On March 25, 1998, this Court heard oral

argument on *Faragher*.[1] The instant case is controlled by this Court's rulings in *Faragher* and, if heard, *Harrison*.

This Court should grant certiorari or remand this case back to the Circuit with orders to stay this case pending the ruling on *Faragher* and, if applicable, *Harrison*. Manifest justice demands the Court so act.

CONCLUSION

Sloan prays that this Court grant her petition for writ of certiorari for the following reasons: 1) to reconcile conflicting circuit opinions as to the issue of vicarious liabiiity for the employer under Title VII; 2) to clarify congressional intent and the law of agency under 42 U.S.C. § 2000e-(b); and 3) in the interest of manifest justice during the pendency of *Faragher* and, if applicable, *Harrison*.

Dated: April __, 1998.

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[1]On March 25, 1998, this Court also heard oral argument on *Gebser v. Lago Vista Independent School District*, 106 F.3d 1223 (5th Cir. 1997), a case involving the employer school board's liability for sexual harassment of a student by a teacher-supervisor. This Court's holding in *Gebser* may also be controlling in the instant case.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 8, 1998

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-20168
Summary Calendar

LINDA SLOAN,

Plaintiff-Appellant,

VERSUS

JOHN SHARP; ET AL,

Defendants,

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas; TEXAS, STATE OF; GRUNDY WILEY, Individually and in his capacity as an employee with the State of Texas; COMPTROLLER OF PUBLIC ACCOUNTS

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Texas
H-94-CV-622

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

Appendix A

DUHÉ, Circuit Judge:[1]

Appellant Linda Sloan, an employee in the Texas Comptroller's office, alleged that her supervisor, Appellee Grundy Wiley, began sexually harassing her in 1989 and that he continued to do so until she was fired in late 1995. Sloan filed a Title VII claim against the Comptroller alleging *quid pro quo* sexual harassment and a hostile work environment. Sloan alleged that the Comptroller was liable for Wiley's acts. The complaint also included a § 1983 claim against Wiley alleging violation of Sloan's Fourth, Fifth, and Fourteenth Amendment rights. The district court dismissed the § 1983 claim for failure to state a claim. The Title VII claim was tried to a jury, which found for the Comptroller. We affirm.

I

In 1980, Sloan began working for the Comptroller in Fort Worth and Arlington, Texas. In 1988, she transferred to the Southwest office in Houston. In 1989, Wiley became the manager at the Southwest office. Paul Eicke ("Eicke") and Fern Francis ("Francis,") worked as supervisors under Wiley and reported directly to him. Sloan reported either to Fern or Eicke.

Sloan alleges that once Wiley became the manager of the Southwest office, he began a pattern of sexual harassment that became progressively more intense. She testified to numerous events in the workplace, on the job away from the workplace and one occasion at her home of what she considered to be harassment by Wiley.

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1. Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Sloan alleges also that Wiley tolerated her coworkers' harassment of her. Sloan testified that when she reported the incident to Wiley he told her that it "was a man's world and women have got to get used to this."

In another incident, another coworker touched Sloan in an inappropriate way. Sloan again alleges that she told Wiley about the touching and that he took no action.

Last, Sloan states that a third coworker made an inappropriate remark to her. Sloan reported the remark to Wiley, and Wiley told the coworker to apologize to Sloan. Sloan alleges that shortly after the apology, Wiley and the coworker went into Wiley's office and began laughing.

In a final incident with Wiley, Sloan alleges that she was waiting in line to get cake at another office birthday party when someone pinched her buttocks. When she turned around she saw Wiley taking his hand down and she threatened to slap him. Sloan testified that Wiley left the room, and she went across the hall to visit with a coworker. A few minutes later, Wiley bumped into Sloan while she was talking to the coworker in the hall. The parties dispute whether Sloan was knocked to the floor.

After this incident, Sloan contacted Judy Brittain ("Brittain"), the employee assistance liaison for the Comptroller's office. Brittain talked with Sloan at length over the phone. Brittain investigated Sloan's sexual harassment claim and found no sexual harassment.[2]

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2. In addition to her telephone conversations with Sloan, Brittain also interviewed Wiley, Eicke, and Francis.

As a result of her complaint, Sloan was transferred to the Northwest office in Houston in 1993. There, she worked for only five days and never returned to work. Because all employees must be removed from the payroll after twelve months without leave, Sloan was fired in late 1995.

Sloan sued the Comptroller under Title VII claiming that the Comptroller was liable to her for *quid pro quo* sexual harassment and hostile work environment under the doctrine of vicarious liability and/or *respondeat superior*. She sued Wiley under 42 U.S.C. § 1983 for violating her Fourth Amendment right against unlawful search and seizure, her Fifth and Fourteenth Amendment right to due process, and her Fourteenth Amendment right to equal protection. Wiley successfully moved for dismissal under Rule 12(b)(6). Sloan's remaining claim against the Comptroller was submitted to the jury, and it found the Comptroller was not liable.

Sloan appeals arguing that the Rule 12(b)(6) dismissal was error and that the trial judge did not properly instruct the jury on the doctrines of vicarious liability and *respondeat superior*.

II

A. STANDARD OF REVIEW

A Rule 12(b)(6) motion is reviewed *de novo*. *Johnston v. City of Houston. Tex.*, 14 F.3d 1056, 1059 (5th Cir. 1994). Ruling on a Rule 12(b)(6) motion requires the court to accept the allegations as true and view them in the light most favorable to the non-mover drawing all reasonable inferences in that party's favor. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). The motion is denied unless it appears to a certainty that the plaintiff

can prove no set of facts that would entitle her to relief. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992).

B. ANALYSIS

Wiley moved for a Rule 12(b)(6) dismissal on the grounds that Sloan could not seek relief under both Title VII and § 1983 because Sloan failed to show an independent basis for the § 1983 claim. Wiley relied primarily upon *Jackson v. City of Atlanta, Tex.*, 73 F.3d 60 (5th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) which held that the same facts that support a Title VII claim cannot also support a separate § 1983 claim. The district court found that despite the fact that Sloan was given another opportunity to replead, she did not allege any conduct that supported her claim for a constitutional injury.[3]

The district court held that *Jackson* only reaffirmed the rule that a plaintiff may pursue claims under both Title VII and § 1983 if the predicate for the § 1983 is a right independent of one that Title VII creates. Moreover, the district court's analysis of the due process claim examines whether Sloan stated her claim with factual detail and particularity. Whether the claim arose from identical facts was not controlling.

The court found that Sloan did not allege any facts that could countenance a claim for a due process violation. When the court dismissed Sloan's third amended complaint, it stated that Sloan's repleaded complaint should state the specific conduct that resulted in damage to her bodily integrity and how

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3. Sloan only briefs the Fourteenth Amendment due process claim; therefore we address only that claim. All issues not briefed are waived. *Villenueva v. CNA Ins. Co.*, 868 F.2d 684, 687 n.5 (5th Cir. 1989); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

it amounted to a constitutional deprivation. The court also stated that the amended pleading must address Wiley's qualified immunity defense. Sloan's fourth amended complaint does not address any of these requirements. Sloan argues that she alleges she suffered a due process violation when Wiley bumped into her and touched her leg, but she does not explain how this amounts to a due process violation. Nor does her complaint address Wiley's qualified immunity defense. She argues that Wiley does not have a qualified immunity defense because the court denied his motion for summary judgment based on qualified immunity and he did not cross appeal. Thus, he waived his defense. The record cites that Sloan refers to do not show that Wiley's qualified immunity defense was denied, and thus he has not waived his defense. Therefore, under *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), Sloan has not pled her claim with factual detail and particularity. *Id.* at 1430.

III

Sloan's second issue on appeal is that the court did not fully instruct the jury on *respondeat superior* and/or vicarious liability.

A. STANDARD OF REVIEW

We review a trial judge's jury instructions with deference because "it is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved." *Treadway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir. 1990) (internal quotation marks omitted). We apply a two part test to evaluate objections to the failure to give a

a requested instruction. The objecting party must first show that the proposed instruction correctly states the law. If it does, then we determine if the given instruction was misleading. We reverse the judgment only if the charge as a whole leaves substantial and unremovable doubt as to whether the jury was properly guided in its deliberations. *Id.* at 167-68.

B. ANALYSIS

Sloan requested that the trial court's instruction to the jury on *respondeat superior* read:

> The Court instructs you that *respondeat superior* in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination.
>
> The Court finds that Plaintiff was in a protected group and that the alleged harassment complained of was based on sex.

As for her claim of a sexually hostile work environment, Sloan asked that the jury instruction read:

> Sexually discriminatory verbal intimidation, ridicule and insult may be sufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.
>
> Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the

supervisor was entrusted with the position of responsibility of supervising the employee.

The court's actual instructions explained the elements of *quid pro quo* sexual harassment and hostile work environment. Sloan argues that her proposed instructions fall within the two-part *Treadway* test. She argues that she meets the first part of the test because the requested instruction correctly stated the law. Sloan contends that because one of the elements of *quid pro quo* and hostile work environment harassment is whether a defendant knew or should have known of the sexual harassment, leaving out her instruction would misguide the jury. Sloan argues that Wiley and/or Eicke and Francis' alleged commission of sexual harassment satisfies the prima facie elements of notice. Therefore, without the requested instruction, the jury would not have known that no additional reporting to supervisors was necessary for there to be notice where Wiley, Eicke, or Francis either perpetrated or acquiesced in sexual harassment.

The Comptroller argues that even if Wiley sexually harassed or acquiesced in sexual harassment, the Comptroller is not strictly liable. Sloan's proposed instruction misstates the law. In *Patterson v. PHP Healthcare*, 90 F.3d 927, 943 (5th Cir.), *cert. denied*, 117 S. Ct. 767 (1996), we held that agency principles apply to Title VII when intentional wrongs are committed in furtherance of employment; however, the December 10, 1997 tortfeasing employee must think that he is doing the employer's business when committing the wrong. Sloan fails to explain how Wiley thought that he was doing the Comptroller's business when he was allegedly sexually harassing her.

As for Wiley's failure to report the coworker's actions and/or remarks, the jury heard testimony that Sloan reported only

one of the incidents to Eicke, Sloan's direct supervisor at the time, or to Wiley. Thus, there was sufficient evidence for the jury to believe that Wiley did not know of the incidents with the coworkers. Since Wiley did not fail to take action, then the Comptroller cannot be found liable.

AFFIRMED.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED NOVEMBER 21, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-94-622

LINDA SLOAN,

Plaintiff,

vs.

STATE OF TEXAS; COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS; and JOHN SHARP, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF TEXAS,

Defendants.

FINAL JUDGMENT

On the 13th day of November, 1996, the above-styled and numbered case came on for trial. Both sides appeared and announced ready for trial, and the case was tried to a jury, one having been timely requested, from November 13 to November 15, 1996. At the conclusion of Plaintiff's case in chief, Defendants moved for judgment as a matter of law as to Plaintiff's claims. Defendants' motion was denied. At the close of Defendants' evidence, both parties moved for judgment as a matter of law. Both motions were denied. Jury questions were submitted to the jury on Plaintiff's sexual harassment claims.

Appendix B

The jury questions and answers were as follows:

QUESTION 1

Do you find from a preponderance of the evidence that Defendants are liable to Plaintiff as to her *quid pro quo* sexual harassment claim? Answer "YES" or "NO."

ANSWER: NO.

Go to Question 2.

QUESTION 2

Do you find from a preponderance of the evidence that Defendants are liable to Plaintiff as to her hostile work environment sexual harassment claim? Answer "YES" or "NO."

ANSWER: NO.

If you answered "YES" to either Question 1 or Question 2, please go to Question 3. Otherwise, do not answer any further questions.

QUESTION 3

What sum of money, if any, do you find by a preponderance of the evidence should be awarded to Plaintiff as compensatory damages for Defendants' unlawful actions? Please answer in dollars and cents.

ANSWER: Not Answered.

Go to Question 4.

Appendix B

QUESTION 4

What sum of money, if any, do you find by a preponderance of the evidence should be awarded to Plaintiff as lost back pay, if any, that resulted from Defendants' unlawful actions? Please answer in dollars and cents.

ANSWER: Not Answered.

Based on the verdict, the Court ORDERS that Plaintiff take nothing from Defendants.

This Order is a FINAL JUDGMENT.

Signed this 21st day of November, 1996.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 12, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20168

LINDA SLOAN

Plaintiff-Appellant

—

v.

JOHN SHARP; ET AL

Defendants

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas; TEXAS, STATE OF; GRUNDY WILEY, Individually and in his capacity as an employee with the State of Texas; COMPTROLLER OF PUBLIC ACCOUNTS

Defendants-Appellees

Appeal from the United States District
Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Appendix C

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

IT IS ORDERED that appellant's unopposed motion for leave to file petition for rehearing out of time is GRANTED.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ John M. Duhé Jr.
JOHN M. DUHÉ, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX D — EXCERPTS FROM PARTIES' PROPOSED JURY INSTRUCTIONS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED NOVEMBER 12, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-0622

JURY REQUESTED

LINDA SLOAN,

Plaintiff,

STATE OF TEXAS; COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS; JOHN SHARP, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF TEXAS; and GRUNDY WILEY, INDIVIDUALLY,

Defendants.

THE PARTIES' PROPOSED JURY INSTRUCTIONS*

Under the Procedures Manual of the Honorable Judge Vanessa D. Gilmore, as required under paragraph 6B(l)a, the parties file Proposed Jury Instructions.

*Docket Entry 153.

Appendix D

AGREED INSTRUCTION NO. 3:*

* * *

**REQUESTED BY PLAINTIFF —
DISPUTED BY DEFENDANT**

The Court instructs you that respondeat superior in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination.[2]

The Court finds that Plaintiff was in a protected group and that the alleged harassment complained of was based on sex.

*Appears in the Record under Docket Entry 153, pp. 10-11.

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2. *Black's Law Dictionary; Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), *Accord, Jones, supra.*, 722. See also, Larson, *Employment Discrimination*, Section 41.61; *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987).

Appendix D

DISPUTED INSTRUCTION NO. 1:*

* * *

**REQUESTED BY PLAINTIFF —
DISPUTED BY DEFENDANT**

Sexually discriminatory verbal intimidation, ridicule and insult may be sufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.[2]

Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the supervisor was entrusted with the position of responsibility of supervising the employee.[3]

*Appears in the Record under Docket Entry 153, pp. 17.

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2. *Harris v. Forklift Sys., Inc.*, 510 U.S.____, 126 L.Ed.2d 295, 114 S.Ct. 367, 370-71.

3. *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986); *Jett v. Dallas Indept. School District*, 798 F.2d 748, 762, fn. 13 (5th Cir. 1986); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-944 (5th Cir. 1996).

Supreme Court, U.S.
FILED
JUN 5 1998
OFFICE OF THE CLERK

No. 97-1656

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LINDA SLOAN,
Petitioner,

v.

JOHN SHARP, Comptroller, In His Capacity as Head of Comptroller of Public Accounts for the State of Texas and STATE OF TEXAS,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was it reversible error for the trial court to decline to instruct the jury, in a suit under Title VII of the Civil Rights Act of 1964, that the employer entity is, in effect, strictly liable for the alleged sexual harassment of the plaintiff by a lower-level supervisor, when the plaintiff failed to satisfy the essential elements of either a "quid pro quo" or a "hostile environment" sexual harassment claim, resulting in a verdict for the defendant?

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No. 97-1656

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LINDA SLOAN,
Petitioner,

v.

JOHN SHARP, Comptroller, In His Capacity as Head of Comptroller of Public Accounts for the State of Texas and STATE OF TEXAS,
Respondents.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

STATEMENT OF THE CASE

Linda Sloan, a former employee of the Comptroller of Public Accounts for the State of Texas,[1] sued the Comptroller and her

[1]Which, as the trial court noted and as the petitioner acknowledges, Pet. at 8 n. 1, is legally identical to the "State of Texas" and to "John Sharp in his official capacity as Comptroller," whom Sloan originally set out in her pleadings as separate defendants. Here, as in the Petition for Writ of

former immediate supervisor, Grundy Wiley, for sexual harassment. Her separate claim under 42 U.S.C. § 1983 against Wiley was dismissed by the trial court, the dismissal was affirmed on appeal, and Sloan does not seek to revive that claim here. Consequently, her petition to this Court concerns only her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), against the Comptroller for sexual harassment of her by Wiley.

The jury to whom Sloan presented her c[illegible] heard evidence from which it could, and apparently did, reasonably conclude as follows:

Prior to coming under Grundy Wiley's supervision in 1989,[2] Linda Sloan had a history of insubordination, for which she was reprimanded. Trial transcript at pages 351-352 (Tr. 351-352). From 1988 (at the latest) onward, Sloan was frequently counseled about depleting her sick leave and excessive absence. Tr. 258-265.

Wiley was "friendly" and "approachable" toward women in the Comptroller's Houston southwest office where he and Sloan worked. Tr. 98-99. However, as at least five witnesses testified, he did not behave offensively, inappropriately, flirtatiously, or unprofessionally. Tr. 100, 103-105, 112-113, 141, 538, 545. Wiley did not make a practice of hugging female employees. Tr. 389, 545. On a few occasions Wiley walked in the office in his socks, when a new pair of shoes were hurting his feet. Tr. 85-86, 111, 386-387. When another female employee appeared in the office wearing an evening gown, Wiley, after conferring with higher management, counseled her to dress more appropriately.

Certiorari, the defendant is referred to as "the Comptroller."

[2]Before he became her supervisor, Wiley was on an employee softball team with Sloan in San Antonio, but he never asked her out for drinks. Tr. 379-380.

Tr. 392-394.

In the summer of 1990, unbeknownst to Wiley, his sister arranged for a stripper to perform at the office on Wiley's birthday. Tr. 111-112, 137-141, 148-149, 390-392, 538-540. Surprised and embarrassed, Wiley ordered the performance halted before the dancer removed her clothes, much to the annoyance of the assembled employees (including many of the women). *Id.* Sloan was not ordered to attend the event nor prevented from leaving. Tr. 538-540.

Sloan had difficulty completing tasks, concentrating on details, and following directions. Tr. 113, 354, 358. These problems were especially evident when she had to learn a new automated collection system the office adopted. Tr. 360-362, 369. Together, Wiley and female supervisor Fern Francis spent time at Sloan's desk assisting her with the new system. Tr. 101-102. But Wiley helped others also, and did not spend an inordinate amount of time with Sloan. Tr. 113, 142, 387-388.

Wiley did not enter Sloan's office shoeless, sit on her desk without shoes, or put his shoeless feet on Sloan's feet. Tr. 386. Wiley accompanied Sloan to "the field," as he did the other enforcement officers, but he never put his hand on Sloan's leg. Tr. 388. He did not ask Sloan about her boyfriends, nor did he ask her any more personal questions than he asked other employees. Tr. 380-381. Wiley asked Sloan and other employees to lunch on occasion, but Sloan never objected. Tr. 382-383. Wiley never joined Sloan for lunch uninvited. Tr. 383.

Wiley did not intrude on Sloan's privacy at home. He did not ask Sloan to let him come to her house for dinner. Tr. 383. Nor did ever push his way into her home. Tr. 388. He once delivered a travel reimbursement check to her house, during the daytime, but only after she had repeatedly contacted his secretary indicating that she needed the money urgently. Tr. 448-449.

Once, after work hours, when Wiley was about to leave town and needed to get into the office, but did not have his pass key, he contacted employees who lived close to the office for assistance. Tr. 385-386. After calling two others (both males) who did not answer, he called Sloan. *Id.* Without objection, Sloan met him at the office with her pass key. *Id.* Wiley was accompanied by his son, who was eleven or twelve at the time, and Sloan was accompanied by her husband. Tr. 386.

Wiley never told Sloan that if she were nicer to him she could get more out of him. Tr. 353. Nor did he, in any other words, promise any job-related reward for sexual favors. Tr. 366. Because she made progress in her performance, Wiley recommended Sloan for a promotion, which she received in early 1992, with a raise. Tr. 352, 367-368, 443-448.

Alleged acts of harassment of Sloan by her peers Navarro (remark that he could bring her to climax), Herron (touching her leg), and Moore (inviting her to sit on his lap) were never reported to Wiley. Tr. 388-389. Nor were they reported to Sloan's direct supervisor at the time, Paul Eicke. Tr. 136-137. Darrell Stewart, who witnessed the "climax" remark, did not report it either to Wiley or to the Comptroller's investigator Judy Brittain. Tr. 94-95. Wiley never said to Sloan, in response to any of the foregoing incidents, that, "This is a man's world and women have to get used to it." Tr. 390.

However, in May of 1992, when Sloan did report to Wiley a crude remark by employee Jodie Moore, that some change Sloan had brought him had pubic hairs in it, Wiley made Moore apologize, orally reprimanded him, and moved him to an area away from Sloan. Tr. 113, 300-301, 371-372, 381. Wiley and Moore did not laugh together about it afterward. Tr. 372, 400.

In late June of 1992, Sloan accused supervisor Fern Francis of intentionally bumping into her in the hallway. Tr. 289-290, 370-

371, 483-484. At about the same time, Wiley reprimanded Sloan for errors in her use of the automated collection system. Tr. 371. Thus, the stage was set for her July 1992 "bumping" allegation.[3]

The alleged "bumping" followed a July 8, 1992, birthday celebration in the office breakroom, which Wiley did not attend. Tr. 373-374. Not being present at the party, Wiley did not pinch Sloan on the buttocks while standing in line behind her for cake and punch. Tr. 373-375, 546. Thus, Sloan did not declare in response to the pinch that she would "slap the shit" out of Wiley. Tr. 375, 546.

Shortly after the party, fellow employee Rose Bonney stood conversing with Sloan in the hallway. Tr 546. Wiley, who was walking down the hall looking in another direction, bumped into Sloan. Tr. 373-376, 547. Neither Sloan nor Bonney was knocked down. *Id.* Sloan did not appear to Wiley to be hurt. Tr. 415. Wiley apologized and asked if Sloan was "okay," to which Sloan replied, "Do you have a problem?" Tr. 374, 548. Sloan and Bonney then continued their conversation. Tr. 549. Sloan did not complain to Bonney that she had been hurt and did not have to be assisted back to her office. *Id.*

Later that day, when Sloan complained to Eicke, he insisted that she contact Judy Brittain at the Comptroller's Austin headquarters. Tr. 466. Sloan did not indicate to Eicke that she felt she had been sexually harassed. Tr. 467. Ms. Brittain was the employee assistance liaison, responsible for assisting employees with a wide range of personal problems. Tr. 468-471. In her initial call to Brittain on or about July 8, 1992, and in five or six calls thereafter, Sloan did not describe the "bumping" in terms

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[3]The trial judge would not allow the Comptroller to present evidence of prior occasions, while Sloan worked for the Comptroller in Austin, when Sloan accused supervisors or peers of deliberately bumping into her, soon after or just before she was reprimanded for her conduct or performance. Tr. 24-27, 33-35.

suggesting sexual harassment. Tr. 479-482.

On July 21st, Sloan finally complained to Brittain of the "bumping" as sexual harassment. Tr. 482. Sloan admits that Brittain took her charge seriously. Tr. 283. Pursuant to Brittain's standard practice, her assistant listened in (with the complainant's knowledge) and took shorthand notes of Sloan's statement as Brittain questioned her. Tr. 482, 485, 513-516, 532-534. Subsequently, a typed statement was presented to Sloan for her review. *Id.* Although given the opportunity to edit and revise the statement, Sloan neither amended it nor signed it. Tr. 292-294, 485-486, 533-534. Nor did she identify, prior to trial, how the statement was incorrect. Tr. 294-298. Sloan's statement to Brittain included nothing about Wiley's "rescinding" a promised raise, pinching her, putting his hand on her leg, or tolerating harassment by other employees. Tr. 291.

Brittain talked to all of the people identified by Sloan as potential witnesses. Tr. 143-144, 377, 419-420, 487-494, 527-529. Sloan did not identify co-workers Craddock, Coleman, Shepherd, and Bridges to Brittain as persons with relevant knowledge. Tr. 487. However, Bridges' testimony was supportive of Wiley, Tr. 110-114, while Craddock, Shepherd, and Coleman did not witness harassment of Sloan. Tr. 69-70, 86, 102-103.

After her thorough investigation, Brittain presented the results to the executive committee (consisting of the highest officials of the agency after the Comptroller), who reviewed them and concluded that Wiley had not sexually harassed Sloan. Tr. 478-479, 494-495.

In November of 1992, Wiley placed Sloan on probation for excessive absences. Tr. 234. A thorough medical examination, in conjunction with Sloan's worker compensation application, casts serious doubt on her claim of injury resulting from the July 1992

"bumping." Tr. 304-310. In May of 1993, Sloan was transferred to another field office, where she worked for five days before leaving and never returning to work. Tr. 266-267.

Under the state Appropriations Act, which governs all state agencies, an employee must be removed from the payroll after twelve months of leave without pay. Tr. 557-558. After a year on leave without pay, Sloan was terminated by the Comptroller effective December 31, 1995. Tr. 236-237. The January 4, 1996 termination letter informed Sloan that she could re-apply for a position during the next six months, but she never did. Tr. 267-268.

When Debra Shepherd complained in late 1993 that Jodie Moore had sexually harassed her, Judy Brittain investigated and upheld the charge. Tr. 83-804, 504. Although Shepherd complained only once, and incompletely, to Wiley, Tr. 79-80, the Comptroller terminated Wiley in early 1994 and demoted Francis[4] for failing to report Shepherd's complaint of harassment. Tr. 84-85, 340-341, 402, 537.

As acknowledged in the Petition for Writ of Certiorari ("Pet.") at 7, the jury found for the defendants Comptroller and Wiley, and the judgment on the verdict was affirmed on appeal.

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[4] Francis' demotion lasted a year, since which she has not been restored as a supervisor. Tr. 537, 541.

ARGUMENTS FOR DENYING THE PETITION

I. Because The Petitioner Failed To Prove Sexual Harassment, The Issue Of Whether The Trial Court Correctly Instructed The Jury On The Respondent's Liability For The Supervisor's Conduct Is Moot.

Sloan argues in her petition that because the trial judge refused to instruct the jury, in effect, that "once Wiley had knowledge of sexual harassment, even if Wiley was the harasser, Wiley's knowledge was imputed to the [Comptroller]," consequently "the jury did not understand . . . that if it believed the testimony of Sloan and other witnesses with regard to Wiley's sexual harassment and Wiley's failure to report sexual harassment to upper management, the [Comptroller] was liable for sexual harassment under Title VII unless the [Comptroller] took prompt remedial action." Pet. at 8-9.

Under well-settled Fifth Circuit precedent which Sloan does not challenge, the court below, correctly, reviewed the trial court's jury instructions with deference, refusing to reverse the judgment unless Sloan could show (1) that her proposed instruction correctly stated the law, and (2) that the court's instruction, in the context of the charge as a whole, was misleading. App. A at 6a-7a. *See also,* Wright & Miller, 9A FED. PRAC. & PROC. CIV. 2d (1995) at §§ 2556, 2558.

Even if Sloan could show that the trial court's instruction was incorrect — which she cannot — the charge cannot have misled the jury because, as a matter of law, Sloan did not prove sexual harassment. Only if reasonable jurors could have found from the evidence that Wiley harassed Sloan could the jury have been "misled" about when the Comptroller's duty to remediate the harassment arose.

Sloan's allegations against Wiley fall into three categories: (1) Wiley's alleged quid pro quo harassment of Sloan, (2) Wiley's alleged acts directly creating a "hostile environment," and (3) Wiley's alleged toleration of "hostile environment" harassment of Sloan by her co-workers.

A. The Petitioner Failed to Prove Quid Pro Quo Harassment

As a matter of law, the quid pro quo claim fails on the merits, regardless of respondeat superior liability.[5] The trial court properly instructed the jury, *without objection by Sloan*, that to prevail on a quid pro claim, the plaintiff had to prove that "[t]he acceptance or rejection of the harassment by Plaintiff [was] an express or

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[5]The record is quite consistent that, while Wiley had a variety of supervisory responsibilities — e.g., to "motivate staff," to evaluate employees, to give oral reprimands, to assign personnel to specific workspaces, Tr. 348-349, 351-353, 365, 371-372, 381-382 — when it came to terminations, raises, and promotions, Wiley could only *recommend* action. Tr. 246, 352. Eicke testified only that "the State of Texas" could fire him. Tr. 148. And there is absolutely no indication from the evidence that Wiley had any sort of hiring authority. Indeed, it appears that transfers of employees in and out of Wiley's unit had to be approved by the division director above Wiley. Tr. 501-502. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1985), this Court, while "declin[ing] the parties' invitation to issue a definitive rule on employer liability," declared "that Congress wanted courts to look to agency principles for guidance in this area," cautioning that "such common-law principles may not be transferable in all their particulars to Title VII . . ." *Id.* at 477 U.S. 72, 106 S.Ct. 2408. Under Texas common law, "agency principles" apply differently to a state agency than to a private corporation. In contrast to a private principal, a state agency cannot be bound beyond an agent's *express* authority. *Moore v. Office of Atty. Gen.*, 820 S.W.2d 874, 878 (Tex. App. — Austin 1991, no writ) ("the rule that an agent can bind his principal by acts within his apparent authority has been held not to apply to public officers"); *Fazekas v. University of Houston*, 565 S.W.2d 299, 304 (Tex. Civ. App. — Houston [1st] 1978, writ ref. n.r.e.), *appeal dismissed*, 440 U.S. 952, 99 S.Ct. 1487 (1979), relying on *State v. Ragland Clinic-Hospital*, 159 S.W.2d 105 (Tex. 1942).

implied condition to the receipt of a job benefit or the cause of a tangible job detriment . . ." Because, by her account, she spurned all of Wiley's advances, Sloan thus committed herself to show that "rejection of [Wiley's] harassment [was] the cause of a tangible job detriment."

However, the uncontrovered evidence, not only from Wiley's testimony but from the personnel records of the agency, shows that in February of 1992, after the date of most of Sloan's pre-"bumping" allegations, Sloan received, pursuant to Wiley's recommendation, a promotion to Enforcement Officer IV and a raise. Sloan's subjective belief that she was not promoted, Tr. 247-248 ("Not to my knowledge"), is not evidence.

Even if Sloan were not required to show tangible adverse consequences for spurning Wiley's advances, it would make no difference for this case. To treat the one isolated remark Sloan attributes to Wiley — i.e., that "if [she] would be . . . nicer to him [she] could get more out of him," Tr. 248 — as conditioning job-related benefits on sexual benefits would trivialize the claim of quid pro sexual harassment. Any verdict based on that evidence, regardless of what the jury was instructed as to the Comptroller's vicarious liability, would be subject to judgment as a matter of law for defendants under Fed. R. Civ. Pro. 50(b)(1)(c). *Cf., Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211-212 (7th Cir. 1986) (the comment, "what will I get for it?," in response to the plaintiff's request for assistance, was not sexual harassment).

Thus, even under the standard favored by the plurality opinion in *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom., Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S.Ct. 876 (1998), Sloan would lose. Under that view, a supervisor's threat may constitute quid pro quo sexual harassment without subsequent adverse action, but only when the "threat . . . *clearly* conditions *concrete* job benefits or detriments on compliance with sexual demands . . ." *Id.* at 123

F.3d 499 (FAUM, J., concurring) (emphasis added). The plurality's reasoning was that "a *clear* and *serious* quid pro quo threat alters the 'terms and conditions' of employment . . . even if the threat remains unfulfilled." *Id.* (emphasis added). The cases relied upon by the plurality similarly stress clarity and concreteness. *Id.* at n. 6 (e.g., "intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation"). Note that in each of the cases consolidated in the *Jansen* decision, the supervisor made "repeated advances." *Id.* at 493 (per curiam).

B. The Petitioner Failed to Prove Hostile Environment Sexual Harassment.

The trial court correctly charged the jury, *without objection*, that Sloan "must prove that harassment was sufficiently severe or pervasive so as to alter the conditions of the Plaintiff's employment and create an objectively hostile . . . or abusive environment, one that a reasonable person would find or abusive." *See, Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65, 67, 106 S.Ct. 2399, 2404-2405 (1986).

Even according to Sloan's version of the events, the alleged harassment was not so severe or pervasive as to violate Title VII. According to Sloan, over a two to four year period:

* Wiley called Sloan into his office and visited her desk more than he did other employees;

* Wiley walked into Sloan's office without shoes on (but not barefooted), sometimes sat on her desk, and on an unspecified number of occasions touched Sloan's feet with his unshod feet;

* Wiley asked Sloan "personal" questions, such as what kind of perfume she was wearing;

* Wiley asked Sloan out to lunch and on one occasion joined Sloan and another employee for lunch uninvited;

* Wiley called Sloan at home in the evening "ten or more" times, sometimes asking if he could come over for dinner;

* On one occasion Wiley put his hand on Sloan's upper leg while they were in the car together;

* On one occasion, Wiley had Sloan (accompanied by her husband) meet him at the office after hours so he could use her pass key to get into the building;

* On one occasion, when Sloan was home sick, Wiley took an expense check to her house, "*sort of* pushed his way in," asked her how she was, and said he missed her and wanted her to return to the office;

* On one occasion, Wiley told Sloan that if she would be nicer to him she might get more out of him;

* On one occasion, a stripper performed in the office (indisputably without Wiley's prior knowledge or consent) for up to twenty minutes before being made to stop;

* On one occasion, Sloan felt a pinch on her buttock (though she did not actually see Wiley do it);

* On one occasion, Wiley bumped into Sloan in the hallway.

Brief of Appellant Linda Sloan (5th Cir.) at 7-9, 11, 13. The fact that Sloan has compiled a seemingly lengthy list does not render Wiley's conduct objectively abusive. Most of the acts are

not even "sexual," much less harassment. Sloan's subjective interpretation of acts as sexual — Tr. 171 ("he placed his feet on mine . . . in a sexual manner"; Sloan "felt it was a suggestive — come-on"); 239 ("interpret[ing]" a co-worker's conduct as "sexual"), 248 (Sloan "interpret[ed]" Wiley's "be nicer" remark as meaning "[a] sexual relationship") — does not make them that. A reasonable person, for example, ordinarily would not regard such things as running into someone in the hallway, even if intentional, as conduct "based on sex" (an essential element of the claim). Note that Sloan also charged female supervisor Fern Francis with intentionally bumping into her.

Nor would a reasonable person find many of Wiley's alleged acts so egregious as to alter the conditions of employment. Asking a woman what perfume she is wearing, or, when she has been sick, telling her that she is missed, is something that any supervisor, male or female, might do. Asking an employee to go to the office after hours to let the boss into the building with her pass key might be an imposition, but it is hardly oppressive and is certainly not sexually abusive. A female co-worker, called by Sloan as a witness, testified that she herself sometimes walked through the office without shoes and was not at all put off by Wiley's doing so. Tr. 111. Counseling an employee that being nicer may get her better results with management (i.e., more flies with honey than with vinegar, etc.) is good advice. A male manager should not have to fear that such a remark could subject himself or his agency or company to liability for sexual harassment.

Consequently, Sloan was obliged to show more of a detrimental impact than she did. Although, to be actionable under Title VII, sexual harassment need not "cause a tangible psychological injury," nevertheless it must be "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive . . ." *Harris*, 510 U.S. at 21, 114 S.Ct. at 370. A key determining factor is "whether it unreasonably interferes with an employee's work performance." *Id.* at 23, 371.

Far from showing that working conditions palpably deteriorated because of sexually hostile conduct, all that Sloan could offer prior to the "bumping" is that (1) one of her witnesses saw her crying[6] and (2) Sloan did not complete her field work after the leg touching. Brief of Appellant at 8. Even if Sloan's highly dubious attribution of her absenteeism to injuries sustained in the hallway collision is taken at face value, it is not injury from sexual harassment. Such allegations might support some sort of state common law negligence or assault claim, but they do not belong in a Title VII sexual harassment claim.

C. The Petitioner Failed to Prove Toleration of Peer-on Peer Harassment.

Finally, Sloan's allegations of peer harassment tolerated by Wiley suffer many of the same defects as the allegations discussed above. Sloan alleges that Wiley failed to take action on (1) fellow enforcement officer Navarro's comment to Sloan in front of others that he could bring her to climax and (2) co-worker Herron's "inappropriate sexual touching." Brief of Appellant at 10. It is disputed whether either of these alleged occurrences was ever reported to Wiley.

However, as isolated episodes, these alleged acts might be inappropriate but they do not amount to hostile environment sexual harassment. *See, Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("the burden [is] upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency"). What Sloan actually testified with regard to Herron is that while driving Sloan and another female employee to lunch, Herron reached back and rubbed the "lower calf" of Sloan, who was sitting in the back

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[6]But the witness did not hear what Wiley said prior to Sloan's crying. Tr. 70-71.

seat. Tr. 238-239. Sloan "interpret[ed]" the "rubbing" as "sexual."[7] Tr. 239.

What cannot be disputed is that when Sloan reported Moore's "pubic hair" remark (which, though tasteless, is not legally an instance of sexual harassment[8]), Wiley reprimanded Moore and made him apologize. Sloan also alleges that Moore once asked her to sit on his lap, but does not claim to have asked Wiley to do anything about it. Tr. 242-243. *See, Scott v. Sears, Roebuck & Co., supra*, 798 F.2d at 211-212.

II. The Fifth Circuit Decision In This Case Is Not In Conflict With That Of Any Other Circuit.

In her petition at 11-15, Sloan does not identify a true conflict among the circuits with respect to the facts and issues of this case. The holdings of the decisions on which the petitioner relies, if applied to her case, would not alter the outcome.

In *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), both the instruction sought by the plaintiff and the instruction the appeals court said the trial court should have given differed significantly from the instruction sought by Sloan in her trial. The *Harrison* decision deals with the proper instruction for a hostile environment sexual harassment claim. Under Sloan's proposed charge, the Comptroller would be held liable for the hostile environment created by Wiley "if the supervisor was entrusted with the position of responsibility of supervising the employee." Pet. at 7; App. D at 17a. In effect, the agency or company would be strictly liable whenever the hostile environment

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[7]She also alleged that "on several occasions" Herron asked her to massage his shoulders and once asked her "to give him a smooch." Tr. 239-240.

[8]"Title VII is not a clean language act . . ." *Katz v. Dole*, 709 F.2d. 251, 256 (4th Cir. 1983).

is created by a supervisor. But in *Harrison*, the Tenth Circuit concluded that strict liability "is rarely applicable in hostile work environment cases . . " *Id.* at 112 F.3d 1444. "Generally speaking, an employer will not be charged with constructive knowledge of the harassment merely because a supervisor is the perpetrator of the harassment." *Id.*

Accordingly, the *Harrison* court found no error in the trial court's refusal to give an instruction comparable to that requested by Sloan in this case (that the company "would be liable if [the harasser] had significant supervisory authority over [the plaintiff]"). *Id.*, 112 F.3d at 1451. The court reiterated that "an employer is not strictly liable for hostile work environment sexual harassment committed by one of its supervisors." *Id.*

The *Harrison* court concluded that the instruction in question was "flawed in two major respects": "First, and most significantly," because it told the jury that the company could be held liable for hostile environment sexual harassment "only if [the supervisor] had authority, apparent or otherwise, to harass plaintiff"; and second, because it mis-defined "apparent authority". *Id.*, 112 F.3d 1449-1450. The instructions in Sloan's case did not suffer from those deficiencies; nor did the petitioner object at trial or argue on appeal that they did.

The petitioner characterizes *Karibian v. Columbia Univ.*, 14 F.3d 773 (2nd Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693 (1994), as conflicting with the result in her case both as to quid pro quo harassment and as to hostile environment harassment. Pet. 12. But neither set of holdings in *Karibian* would alter the outcome if applied in Sloan's case.

The Second Circuit agreed "that the district court erred when it required [the plaintiff] to present evidence of actual, rather than threatened, economic loss in order to state a valid claim of quid pro quo sexual harassment." *Id.*, 14 F.3d at 778. However, the court

applied that holding only to "the claim of the employee who submits to the supervisor's demand." *Id.* The court expressly distinguished "a 'submission' case" from a 'refusal' case." *Id.* For the latter: "The gravamen of a quid pro quo claim is . . . that adverse consequences follow from the employee's refusal." *Id.*

Consequently, regardless of the *Karibian* court's holding on agency or respondeat superior concepts (actually, it did not reach those issues for quid pro quo claims), Sloan would still have lost her quid pro quo claim because despite her refusal of Wiley's alleged demands, she nevertheless still received a raise and a promotion on Wiley's recommendation.

The *Karibian* court's holding on employer liability for hostile environment harassment differs markedly from Sloan's requested instruction. "We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." *Id.* at 14 F.3d 780. But the court expressly contrasts the situation "where a low-level supervisor does not rely on his supervisory authority to carry out the harassment . . ." *Id.* In the latter instance, the standard is identical to the one articulated by the trial court in Sloan's case. *Id.*

A review of the petitioner's laundry list of allegations in I-B above shows that for each, either (1) Wiley was not using actual or apparent authority (e.g., the stripper episode, the bumping incident); or (2) whether or not he used delegated authority, Wiley's actions were not sexual in nature and/or were not such that a reasonable person would find abusive (e.g., asking Sloan to let him into the office when he had forgotten his key).

In connection with the latter point, the acts of harassment described in *Harrison* and *Karibian* stand in sharp contrast to

Sloan's allegations (even viewed most favorably to Sloan and against the verdict). Contrast *Harrison*, 112 F.3d at 1440-1441; *Karibian*, 14 F.3d at 775-776.

Similar considerations distinguish Sloan's case from that of the petitioners challenging the decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.) (en banc), *cert. granted*, __ U.S. __, 118 S.Ct. 438 (1997) . Compare the conduct described in *Faragher v. City of Boca Raton*, No. 97-282, Brief for Petitioner, 1997 WL 793076 *4 - *8. *See also, Faragher*, 111 F.3d at 1540 (BARKETT, dissenting) (noting fact-finding of severe and pervasive harassment).

Additionally, a major tenet of the petitioners' argument in *Faragher*, for holding the city liable for lower-level supervisors' hostile environment harassment, is that the City's sexual harassment policy was minimal, not widely disseminated or known, and weakly enforced. *Id.*, Brief of Petitioner at *13 - *17; 111 F.3d at 1546 (TJOFLAT, dissenting). By contrast, the Comptroller's anti-sexual-harassment policy was strongly worded, widely disseminated, and vigorously enforced. Wiley, for example, was eventually terminated for failure to respond to another female employee's complaint.

Consequently, the Sloan result is not in conflict with, nor would it be altered by, the holdings in *Harrison* and *Karibian*, or the position of the dissent and the petitioners in *Faragher*.

III. Any Error In The Trial Court's Instructions Was Harmless.

Even if, contrary to all the foregoing, the petitioner's theory of liability is correct, Judge Gillmore's charge to the jury still was not reversible error. The court instructed jurors that Sloan must prove "that the Defendants knew or should have known of the harassment in question . . ." Under that instruction, Sloan was free to argue to

the jury in closing that because Wiley "ha[d] the power to make employment decisions concerning [Sloan]'s discipline, promotion, performance evaluations, or termination," the Comptroller was thus "responsible" for knowing about Wiley's acts (tracking language of plaintiff's proposed instructions at App. D 16a-17a).

There is no indication in the record that the court blocked any attempt by the plaintiff to make that argument to the jury. Closing arguments do not appear to have been transcribed, a gap in the record that works against the party with the burden of persuasion (as petitioner and as the party with the burden of proof at trial). The Court must presume, then, either that Sloan chose not to make the argument, or that she made it and the jury did not believe it.

By adopting the magistrate judge's November 30, 1995, Memorandum and Recommendation, denying the Comptroller's motion for summary judgment, the district court concluded that, "if the sexual harassment was as public and pervasive as the witnesses indicate, Defendants, arguably, should have been aware of it, long before Sloan complained to Brittain." Record on Appeal, doc. 114 at 10; adopted in doc. 123. Nothing in the court's instruction prevented Sloan from making that argument to the jury. If she did, the jury obviously was not persuaded.

CONCLUSION

In view of all the foregoing, the respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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